Supreme Court, U.S.
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NO. 01-292

IN THE
SUPREME COURT OF THE UNITED STATES

REN LABORATORIES OF FLORIDA, INC.,
Petitioner,

v.

KENNETH WEISS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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September 20, 2001

QUESTIONS PRESENTED

I. In a religious discrimination case, where the employer has asserted as a defense that the plaintiff employee was discharged for "religious harassment" of co-workers in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and the question whether "religious harassment" occurred was a mixed one of fact and law, is the jury's assessment of conflicting witness versions of the alleged harassment subject to being overturned by entry of judgment as a matter of law for the employer?

II. When is an employment discrimination plaintiff required to submit evidence in addition to a prima facie case and pretext, in order to survive a motion for judgment as a matter of law under FED. R. CIV. PROC. 50?

PARTIES TO THE PROCEEDINGS

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Respondent's parent corporation is Gambro Healthcare, Inc., f/k/a Gambro Healthcare Patient Services, Inc., f/k/a REN Corporation - USA. There are no other known parent or subsidiary entities to these parties. There is no publicly held company that owns 10% or more of Respondent's stock.

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BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

KENNETH WEISS respectfully files this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner REN Laboratories of Florida, Inc., seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Weiss v. REN Laboratories, Inc.*, 251 F.3d 161, dated March 8, 2001, that reversed the United States District Court for the Southern District of Florida's entry of judgment as a matter of law against Petitioner after a jury verdict in Petitioner's favor, but upheld the District Court's contingent grant of a new trial.[1] Respondent believes certiorari is not called for, insofar as Petitioner's Questions Presented misstate the trial record, the issues raised therein were adequately addressed by this Court last session in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and no real conflict exists among the Circuit Courts on the application of the *Reeves* standard for judgment as a matter of law.

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[1] Respondent Kenneth Weiss has also filed a Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's conditional grant of a new trial and clarification of the standard for assessing whether "religious hararssment" in violation of Title VII has occurred in a workplace. Sup.Ct. No. 01-217. Respondent raises issues in his Petition which are separate from those raised in REN Laboratories' Petition, although they arise out of the same predicate claims and defenses presented in the lower courts. Respondent urges that if the Court grants certiorari to Petitioner, certiorari should also be granted to Respondent, in view of the fact that the question whether "religious harassment" occurred is a mixed one of fact and law, and the law in this area is in need of clarification from the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

TITLE VII of the CIVIL RIGHTS ACT OF 1964:

42 U.S.C. § 2000e Definitions (2000). For the purposes of this title [42 U.S.C. §§ 2000e *et seq.*] –

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2 (2000). Unlawful employment practices. (emphases supplied):

(a) Employer practices. It shall be an unlawful employment practice for an employer--

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin;

* * * *

(m) Impermissible consideration of race, color, *religion*, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, *religion*, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Introduction.

This is a Title VII religious discrimination case. The jury returned a verdict in favor of Respondent, finding that he was discharged as a result of the practice of his religion ("religion made a difference" in Petitioner's decision to terminate Respondent). The magistrate trial judge granted judgment as a matter of law and alternatively a new trial on the basis that the evidence was insufficient to support the jury verdict.

The Eleventh Circuit Court of Appeals reversed the judgment as a matter of law, concluding that reasonable jurors could have found for the Plaintiff based on a preponderance of the evidence. Appendix to Petition for Writ ("App.") at 3. However, the court also affirmed the conditional order granting a new trial on the basis that the verdict was against the great weight of the evidence. App. at 7.

Factual History.

Every material issue of fact was disputed at trial, including the factual basis for the termination. The case went to trial by consent before United States Magistrate Judge Barry S. Seltzer on a Title VII religious discrimination claim. Respondent's Amended Complaint alleged that he was discharged from his employment with Petitioner based on his religion. (R. 1/28/1.) Respondent was first employed by Petitioner as a medical technician. It was not substantially disputed that Respondent was qualified for his job and performed it satisfactorily. Respondent received a Bachelor of Science degree in biology from the University of New York and a Medical Technologist Degree from St. Jude Hospital. He obtained a national board registry for medical technology and is a member of the American Society of Clinical Pathology. (R. 8/214/120-21.)

Respondent was employed by REN July 14, 1992. (R. 9/215/215.) Pam McDaniel, Respondent's supervisor before he was promoted, admitted that Respondent was "an accurate and

good technical employee." (R. 7/216/112.) She also admitted that Respondent was not "an aggressive harsh person," but to the contrary he was "mild mannered." (R. 7/216/112.) She also agreed that displays of anger would be out of character for Respondent. (R. 7/216/126.) Dr. Brian Walters, scientific director for REN and hence Respondent's supervisor, agreed that Respondent was "technically sound as a medical technologist." (R. 10/217/106.)

Thus, in November 1992 Respondent was promoted to night shift supervisor. Before Respondent was terminated in July 1993, he was given two written warnings regarding substantive job performance (unrelated to religion), one before his promotion in October 1992 (R. 10/217/100,) and one after his promotion in February 1993. (R. 8/214/140.) The October 1992 warning was given by Dr. Walters, and was the only time he had occasion to counsel Respondent regarding employment related issues (R. 10/217/107.) Dr. Walters downplayed the significance of the event saying that "these things happen." (R. 10/217/102.) The February 1993 warning involved a blood test done for AIDS in which Respondent reported the wrong results. McDaniel agreed that all lab employees made mistakes and that even she had received written warnings for mistakes as a lab employee. (R. 7/216/111.)

Respondent told the jury that he was a "born again" Christian. He stated that it changed his life, giving him meaning and a purpose that he did not have before: Christianity fulfilled him. (R. 8/214/123.) Respondent held an interest not only in his own specific religious faith, but also in learning of the faiths of others. As a result of his background and beliefs, discussing religion and religious subjects interested him. Thus, for Respondent it was natural to talk about religion. However, he told the jury that he knew there was "a time and place for it." He noted he had never been fired or disciplined for discussing religion prior to being an employee at REN. He explained that he had talked about it in prior employment situations, in appropriate settings, without any conflicts. (R. 8/214/126-27; 135-36.)

Respondent testified that his faith required him to share his beliefs with others when appropriate. (R. 9/216/223.) He testified

he never continued to discuss religion or his faith with anyone when he knew it was offensive to that person. (R. 8/214/137.) He explained that his approach to other people in regard to religious beliefs was to be "gentle and diplomatic," and that he would not try to force his religious beliefs on someone if they did not want to listen to him. (R. 8/214/137; 181-82.) Respondent knew that REN employed people of other faiths and beliefs, including Moslems, Jews, atheist, and agnostics, and he would speak to them about their beliefs. He informed the jury, however, that those individuals never complained about those discussions. (R. 8/214/136-37.)

Respondent would also openly pray and offer prayer for others. He testified that prayer was important in every aspect of his life, and part of the practice of his faith. (R. 10/217/146.) For instance, Respondent told the jury that once when Mary Piccola and Pam McDaniel informed him they felt ill, they allowed him to pray for them, holding their hands during prayer. (R. 8/214/137.)[2] Neither told him that they were offended. (R. 8/214/139.) On another occasion, Respondent prayed for a co-employee who got hepatitis-infected blood in her eye. The employee consented to the prayer. (Respondent also advised her to see a physician.) (R. 8/214/138-39.)

REN attempted to portray this type of prayer as disruptive and bizarre. For instance, REN brought out an incident through McDaniel involving a coagulant machine that broke during Respondent's shift. Instead of calling a service technician to get the machine fixed, as she alleged Respondent was supposed to, she testified that Respondent only "prayed over" the machine, and then left it broken. (R. 7/216/138-39.) Respondent's version of events was much different. He explained that the machine malfunctioned around 2 or 3 a.m, and he and another employee attempted to fix

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[2] This touching during prayer was described as "laying hands on," a description much more dramatic than the actual conduct. (R. 8/214/137-38.) Piccola in fact admitted she allowed the prayer, but denied the touching. (R. 10/217/200-201.)

the machine according to company procedures, to no avail. One of the employees suggested he pray, and so he did. (R. 8/214/140-42.) Since the machine continued to malfunction, Respondent informed the jury that he followed REN procedures which required him to notify Mary Piccola of the malfunction by e-mail, and then Piccola would have the machine fixed the next day. (R. 8/214/140-42.) There was no evidence introduced of any discipline taken against Respondent over this incident.

Respondent also, in the practice of his faith, gave Bibles to co-workers. (R. 8/214/146.) He never received any negative comments regarding this practice. (R. 8/214/147.) He said that people would receive the Bible and say thank you, with the exception of Jahved Quershi, a Moslem co-worker, who rejected his offer. (R. 8/214/146-47.) However, Respondent testified that he did not insist that Quershi take the Bible, and that Quershi merely said "No thank you." Respondent also testified that he gave a Bible to Mary Piccola and that she received it and thanked him. (R. 8/214/147.) *Respondent never received any written warnings regarding any aspect of the practice of his faith, with the exception of the notice of termination dated July 23, 1993.* (R. 8/214/148.)

It was uncontradicted that REN allowed its employees to discuss religion on the job. (R. 7/216/134.) It was also uncontradicted that no REN employee other than Respondent was disciplined for discussing religion on the job. (R. 7/216/123.) With that factual backdrop, the evidence of discrimination against Respondent chiefly turned upon his termination notice:

> Despite at least two separate warnings, *Ken continues to discuss RELIGION with REN employees*. Claudette Cannatella expressed her concern and discomfort to her immediate supervisor, Debbie Correggio, regarding Ken Weiss discussing what church she attended. When she said NONE, Ken gave her a lecture.

Plaintiff's Exhibit 6a, App. at G1. (emphasis of "all caps" in original.)

On its face, the termination unequivocally stated Respondent was terminated for *discussing religion*. Respondent also showed that the factual assertions contained in the notice were subject to dispute as well: there were not "two separate warnings" and Respondent did not engage in a "lecture" of Claudette Cannatella regarding the church she attended.

The jury heard three versions of the Claudette Cannatella conversation: that version provided by Respondent and his former wife, Virginia Savino; that provided by Cannatella; and that provided by Piccola in her termination notice. Savino testified that she went to a surprise party at REN one night in July 1993 held in honor of the departure of the receptionist, Francesca Garcia. (R. 7/216/63, 67.) When Garcia came into the room with her replacement, Cannatella, she came to Respondent and Savino and introduced them. Garcia then invited Respondent and Savino to come to her church, explaining that she was singing in the choir. Savino told her that they attended church on Sundays, but would attend if they could. (R. 7/216/67-69.) Savino then noticed a crucifix being worn by Cannatella, and asked her what church she attended. Cannatella responded that because she went out on Saturday nights, she didn't get up on Sunday mornings, "but I really should go." Savino replied: "Yeah, its good for everybody to go," and Respondent *then* made his one and only statement to Cannatella: "Yeah, its good for everybody to go." Cannatella then said "Nice to meet everyone," and moved on. (R.7/216/68-69.)

Respondent's version was similar. After Garcia and Cannatella introduced themselves, Savino commented about how pretty her crucifix was. Cannatella thanked her, and Savino then asked what church she attended. Cannatella said "I'm a Roman Catholic, but I'm not attending any church right now." Savino offered that "It's good to attend church... if you're a Christian you should go," to which Cannatella replied, "Yes, you're right." Respondent *then* simply said "Yes," agreeing with Cannatella. Cannatella and Garcia then moved on. (R. 8/214/187-88.)

Cannatella's version was different, creating an issue of fact for the jury to resolve. Cannatella was hired July 22, 1993, and as of the time of trial, she was still employed at REN six years later. (R.

8/214/93.) She recalled the conversation regarding Garcia singing in the choir, but also recalled that it was Respondent who asked about her crucifix, not Savino. (R. 8/214/99.) She also recalled being asked a series of questions, including whether she was a Christian, which church she attended, and when did she last attend church. Cannatella said this part of the conversation only lasted "a few minutes." (R. 8/214/101-105.) But, after she left work that night, she called Deborah Corregio, her friend and supervisor, and the person who got her the job. (R. 8/214/106.) She told Corregio of the conversation, and asked whether she was "going to have to deal with this on a daily basis." (R. 8/214/106.) The next morning Corregio told Piccola. (R. 10/217/143.) When she came in the next day, Cannatella was called into Mary Piccola's office. Piccola told her that she wouldn't "have to worry about [Respondent] bothering you anymore, ***he was terminated***." (R. 8/214/106-107.) Cannatella was "shocked." (R. 8/214/107.) Cannatella described Respondent as "mild mannered," and testified that, despite the "crucifix conversation," she saw no reason she wouldn't have been able to work with Respondent: "I don't think so, he was polite about it." (R. 8/214/108-109.)

Regarding the alleged two prior warnings, Respondent testified that the only written warning he had received regarding religious discussions and his practice of religion was the termination notice itself. (R. 8/214/147-48.) He also testified that the oral conversations he had with REN supervisors gave him no warning that talking about religion, giving out Bibles or praying in public, would result in his termination. (R. 8/214/148-49.) The testimony of McDaniel and Piccola pointed to only two salient events: an August 1992 meeting with Dr. Walters; and an April 1993 meeting between Piccola, McDaniel, and Respondent. (R. 7/214/137, 142.) The evidence before the jury, however, brought into question whether these were "warnings" at all, and whether Respondent had even harassed employees.

Pam McDaniel was the day shift supervisor, acting as the Quality Assurance director. (R. 7/216/103.) Before Respondent was promoted to night shift supervisor, she had some supervisory authority over Respondent. McDaniel testified that in August 1992

Respondent was counseled regarding "unwanted religious discussions." (R. 7/216/137-38.) Nonetheless, she also testified that Respondent's discussion of religion with other employees was not a problem until he was promoted to a managerial level. (R. 7/216/116.) The jury likewise heard from Dr. Walters, to whom McDaniel had referred the matter for investigation, that there was no substance to these allegations. (R. 10/217/91-92, 103.) In fact, *no one* on the laboratory staff corroborated the allegations of "excessive discussion of religion." (R. 10/217/103.) Dr. Walters testified that only because the allegations came from a supervisor (McDaniel), did he then talk to Respondent. Thus, Dr. Walters had a general discussion with Respondent indicating that the topics of "sex, religion and politics" didn't fit into the workplace. He said that he put the other two topics into his discussion because he "*didn't find anything*" in his investigation, and did not want to focus on one topic as opposed to others. (R. 10/217/103-106.) This was not a warning at all, and called into question McDaniel's credibility.

The only other "warning" received by Respondent came at a meeting between Piccola, McDaniel, and Respondent on April 21, 1993. Respondent testified that he was not informed at any time that his behavior regarding discussing religion could result in termination. (R. 8/214/148-49). At the April 21st meeting, they informed him of only one complaint, and they did not tell him who complained or what was said. Their description of the alleged offending conversation was vague, to the effect that the unnamed complaining party "didn't like [his] religious views." (R. 9/215/262-63.) Since he did not know who complained or about what, he asked them to apologize to that person because he didn't "want to offend anybody." (R. 9/215/263.)

McDaniel, however, said that there were multiple complaints from the Moslem co-worker, Jahved Quershi, and Jane Christy and Joan Caruso, presented as gay employees. (R. 9/215/142.) She and Piccola met with Respondent, and Piccola tried to emphasize "how serious these problems were." According to McDaniel, Respondent did not take the criticism seriously. (R. 7/216/146.) Piccola stated that at the meeting she reviewed all the complaints

with Respondent and gave Respondent a written warning, which he signed. (R. 11/218/218-19.) *That written warning, however, was not in Respondent's file.* (R. 11/218/253.) Dr. Walters, who was present at Respondent's termination meeting, testified that he was not aware of any written warning given to Respondent regarding discussing religion. (R. 8/214/122.) Again there was no verbal correction form documenting the "warning." Given Respondent's denial of receiving a written warning, coupled with this lack of documentation, a reasonable conclusion for the jury to have drawn was that not only was there never a written warning, but Piccola and McDaniel had lied about it to back up their reasons for Respondent's ultimate termination.

Quershi, a seven year employee of REN at the time of his testimony, testified that after a couple of religious discussions with Respondent, he asked Respondent to stop talking about religion, and that Respondent was trying to convince him that his religion was the best. (R. 10/217/55.) Quershi also testified about Respondent's attempted gift of a Bible. Quershi refused it and testified that it was offensive to him because he is a Moslem and that "I believe you should know it's very fanatic, I personally wouldn't accept any other religion but Moslem [sic]." (R. 10/217/56.) A fair inference here is that Quershi was hyper-sensitive to the discussion of any other religion but his. Respondent, however, recalled that he offered Quershi a Bible, and Quershi simply rejected it saying "No thank you." Respondent did not insist that Quershi take it, and Respondent did not have a lengthy discussion with him about it. (R. 8/214/146-47.) Respondent noted that Quershi, as a Moslem, prayed regularly, and so prayed on the job. He would leave his post at the appropriate time and go somewhere to pray. As far as Respondent knew, no one ever ridiculed Quershi for his religious practices. (R. 8/214/179.) Respondent thought he had a good working relationship with Quershi. (R. 8/214/185.)

Christy did not testify at trial, but Caruso did. Respondent did not recall Caruso at all, but did recall conversations with Christy. Respondent informed the jury that Christy, like other employees, would voluntarily approach him to talk about religion. Christy

informed him that she was a member of a homosexual church in Ft. Lauderdale. Respondent explained that he did not know that homosexuals had a church, and it intrigued him. He stated: "We would talk about that and one time I gave her a Bible and showed her a passage in there saying what the Bible says about the homosexual lifestyle." (R. 8/214/180.) Respondent denied ever telling her that she would "burn in hell," and denied that he ever told anyone that he was going to "cure their homosexuality." (R. 8/214/181.)

Caruso, an employee of REN since 1990, was quite clearly hostile toward Respondent. She related that Respondent approached her many times to talk to her about religion, but she would not talk to him. He would bring his Bible into her department, point out scriptures that would state different things about her lifestyle, and say that she was going to hell because she was a lesbian. She said that Respondent referred to himself as a "prophet." She said this happened 3 to 4 times a week. (R. 10/217/68-71.) However, Caruso worked the day shift, not the night shift as Respondent did, except during a period of time from the middle of 1992 through January or February 1993. (R. 10/217/85-86.) Even though her testimony was that she was no longer working late as of February 1993, she maintained that she continued to be harassed by Respondent between February and July 1993. (R. 10/217/86.) She did not explain this inconsistency.

Before the "crucifix conversation" with Claudette Cannatella, discussed above, there were two other events in mid-July 1993 which preceded Respondent's termination. The evidence was in conflict, but a reasonable view of the evidence supported Respondent's position. First, Respondent received a written warning and a two day suspension on July 14, 1993 for leaving his shift early the preceding day. The notice indicates that Respondent "Left the shift before testing was complete. Shift was overwhelmed with work and Ken did not help techs." Respondent explained that he would usually leave the lab at 3:00 a.m., which was the end of the shift. However, in general he would stay until he felt, in his professional opinion, that there were no problems and that whoever was left behind could finish the work and lock up the lab. He

testified that there was no requirement by Federal or Florida law that he had to be on the premises until the last technician left. However, the first time he received any warnings or discipline regarding leaving the night shift early was this written warning. (R. 8/214/167.) Significantly, Mary Piccola testified that she issued this written warning, instead of just an oral warning, because in her mind it was a serious offense for a supervisor to leave his shift unattended, in contravention of Florida law: she stated that the supervisor personally had to be on the shift. (R. 11/218/226-27.)

Nonetheless, the jury had already heard Dr. Walters testify earlier that that was incorrect.

> [T]hat's a grey area.... I got to be very honest with you here, sometimes the supervisor may leave before his shift, if all the work is in complete and there's a few specimens left over and he has made provisions with the people in the laboratory.... that's a call that we leave with that supervisor....

(R. 10/217/108-109.) In fact, Dr. Walters stated that the laboratory complied with Florida law simply by having a day shift supervisor who would be on call and available for consultation. In short, the inference which the jury could have reasonably drawn was that the two day suspension was unwarranted under REN's procedures, and that Mary Piccola singled out Respondent and disciplined him unfairly for another reason: because she did not like his religion.

The second event occurred about a week later, on July 21, 1993. Respondent, Piccola and McDaniel met to discuss generally Respondent's job duties. (R. 7/216/128.) Respondent testified that they told him they were increasing his duties, which he expressed he felt was unfair. (R. 8/214/167-68.) But he was primarily disturbed because he had learned when he returned from his suspension that Dr. Walters had taken over his shift, but had not been required to stay on premises (R. 8/214/268,) contrary to the reasoning behind Respondent's suspension and Piccola's directions to him. He confronted Piccola with this, and Piccola did not deny it. (R.

8/214/170-71.)

Respondent then demonstrated for the jury what happened next. He said "Mary, I won't put up with that," and then struck his hand on the desk for "dramatic" effect. He then said "I resent that, that Dr. Walters can leave and I have to stay." (R. 8/214/183.) Piccola's response was to stand up, come out from around the desk, grab his chin and throw him out of the office, saying "Get out of my face, get out of my face." Respondent told her she had no right to touch him, she let go and he left. (R. 8/214/155-56, 171.) On cross examination, Respondent agreed he was upset, but denied being enraged and denied blocking Piccola's way out of the office. (R. 8/214/270.) In fact, that same day he and Piccola met again, and they apologized and agreed to forget the entire incident. (R. 8/214/270-72.)

Piccola and McDaniel had different versions. Piccola denied grabbing or touching Respondent on his face, but because her written report mentioned she touched his chest, she conceded that must have occurred. (R. 11/218/230-33.) McDaniel however recalled that Piccola did touch his face. (R. 7/216/127.) Both Piccola and McDaniel testified generally that he reacted violently, and scared them. Piccola said Respondent blocked her exit from the office. (R. 7/216/147-49; 11/218/230-233.)

On cross examination Piccola admitted that she prepared a written document regarding the July 21st incident on July 23rd, *after* the termination notice was done. (R. 11/218/276.) On her document regarding the July 21st incident, in handwriting she noted that it wasn't given to Respondent because he "was terminated for another reason" (*i.e.*, "RELIGION").

As discussed earlier, the "crucifix conversation" lead to Respondent's discharge. The notice of termination, dated July 23, 1993, *only* mentioned religious discussions. Respondent testified that he was called into Piccola's office when he arrived that day. He was presented the notice without discussion, which he read and signed, and then he was escorted out of the building. (R. 8/214/152.)

Procedural History.

The trial court deferred all motions for judgment as a matter of law, and allowed the case to go to the jury. After four days of trial, the case was submitted to the jury. The jury was instructed in pertinent part as follows with respect to Respondent's charge of religious discrimination:

> As a matter of law, the Court instructs you that it is an unlawful employment practice for REN Laboratories to discharge Ken Weiss because of his religion. The term "religion" includes all aspects of Ken Weiss' religious observance and practice, as well as belief, unless REN Laboratories demonstrates that it is unable to reasonably accommodate Ken Weiss' religious practice without undue hardship on the conduct of REN Laboratories' business.
>
> More specifically, the Plaintiff alleges that he was terminated for discussing religious issues with people at REN Laboratories in an non-offensive manner.
>
> The Defendant denies that Mr. Weiss was terminated for discussing religion in a nonoffensive manner. REN claims that he was terminated for harassing the employees about his religion as well as for insubordination and unsatisfactory performance.
>
> In order to prevail on his claim, the Plaintiff must prove each of the following things by a preponderance of the evidence:
>
> 1. That he was a member of and/or practices a particular religion; and
> 2. That he was qualified for and satisfactorily performed the job at issue; and
> 3. That he suffered some adverse employment action; and
> 4. That someone outside the protected class of which he is a member was treated differently.

> [I]t is not necessary for the Plaintiff to prove that religion was the sole or exclusive reason for the Defendant's decision, it is only necessary for the Plaintiff to prove that religion made a difference.
>
> The parties agree that the Plaintiff was permitted to practice his religion in the workplace to the extent that he did not harass other employees. The parties further agree that the Defendant could lawfully discharge an employee for harassing other employees, for performing his tasks in an unsatisfactory manner, or for insubordinate behavior. It will be up to you, the members of the jury, to determine whether or not Plaintiff harassed other employees, performed his duties in an unsatisfactory manner or behaved in an insubordinate manner.

See Appendix to Petition for Writ of Certiorari in *Weiss v. REN Laboratories of Florida, Inc.*, Sup. Ct. No. 01-217, at E4 - E6. While the jury was instructed that Respondent could lawfully terminate Respondent for harassing co-workers, *id.* at E6, the jury was not provided with a definition of Respondent's defense of religious harassment.

The jury returned a verdict for Respondent. The jury found the following in response to special interrogatories:

1. Mr. Weiss was qualified for, and satisfactorily performed his job (App. to Petition No. 01-217 at F1);
2. Mr. Weiss did not harass other employees (*Id.*);
3. Religion made a difference in REN's decision to terminate Mr. Weiss (App. to Pet. No. 01-217 at F2);
4. Mr. Weiss suffered compensatory damages in the amount of $35,000 (*Id.*); and
5. REN acted willfully, intentionally or with reckless indifference to Plaintiff's rights in terminating Mr. Weiss, awarding him $125,000 in punitive damages. (App. to Pet. No. 01-217 at F3)

On Respondent's post-trial motions, the court entered judgment as a matter of law and alternatively granted a new trial. App. C to Pet. No. 01-217. Respondent appealed to the Eleventh Circuit.

On review of the FED. R. CIV. PROC. 50 judgment as a matter of law, without reweighing the evidence and considering the facts in a light most favorable to Respondent, the Eleventh Circuit held:

> Reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in appellee's decision to terminate Appellant.

App. at 3.

The Court of Appeals thus found, based on the testimony of the two REN supervisors, Dr. Brian Walters and Pamela McDaniel, that Respondent was a good and accurate employee. *Id.* The court "accepted" Respondent's statement that the Moslem co-worker to whom he offered the Bible simply rejected the offer, saying "No thank you" and that Respondent did not try to push the Bible on him. App. at 3-4. The court accepted Respondent's testimony that he never told a lesbian co-worker that she would "burn in hell." App. at 4. The court accepted Respondent's testimony that the coworkers with whom he prayed did so by consent and were not offended, and that Respondent's only involvement with Claudette Canatella at the farewell party was to agree with Savino's remark that "It's good to attend church." *Id.*

REASONS A WRIT SHOULD NOT ISSUE

I. CERTIORARI IS NOT WARRANTED BECAUSE THE ELEVENTH CIRCUIT PROPERLY REVIEWED ALL EVIDENCE IN THE CASE IN THE LIGHT MOST FAVORABLE TO THE RESPONDENT, AND PETITIONER'S EVIDENCE WAS NOT UNDISPUTED

Petitioner's appeal stands almost entirely on its assertion that the Eleventh Circuit "reviewed only the self-serving testimony favoring [Respondent]" in reversing the District Court's grant of judgment as a matter of law. Pet. at 6. *See also* Pet. at 7 ("the Eleventh Circuit has taken the position that a plaintiff's self-serving testimony alone... is enough evidence of pretext to withstand a motion for judgment as a matter of law"); Pet. at 13 ("If Mr. Weiss can get to a jury based only on the self-serving evidence cited by the Eleventh Circuit, there is no real case-by-case analysis espoused... in *Reeves*"). Petitioner complains that

> the Eleventh Circuit only considered the self-serving testimony of Mr. Weiss that he did not harass or offend his subordinates or co-workers and that he only discussed religion with those subordinates and co-workers who consented to it or requested he pray with them.

Pet. at 6-7. Petitioner is incorrect in this assertion for at least two reasons: first, the Eleventh Circuit according to its own statements did in fact did consider the entirety of the evidence in the record in reviewing the judgment; and second, the Petitioner's evidence was not in fact "undisputed" as it alleges (Pet. at 6, 7), but highly disputed, both through Respondents' own statements and those of others, as well as through direct documentary evidence of religious discrimination.

The Eleventh Circuit clearly stated that it was applying the correct test, that of a "de novo" review under the same legal standard as the trial court. Pet. App. at 2. Rather than considering *only* the Respondent's "self-serving testimony," as Petitioner contends it did, the Court of Appeals made its decision "based upon the evidence presented," App. at 3, citing *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). The court appropriately "consider[ed] the evidence in the light most favorable to the non-moving party [Respondent]," but refrained from "weighing the evidence or assessing the credibility of witnesses." *Id.* Applying this standard, the Court of Appeals stated:

> We conclude reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in [REN's] decision to terminate [Weiss].

App. at 3. The court noted that it was bound to "consider the facts in the light most favorable to [Weiss]," and that it was "bound to accept [Weiss'] version of the disputed facts...." *Id.* The court did not, however, state that it *only* relied upon Respondent's testimony; it simply set out portions of Respondent's testimony that reflected his version of the disputed facts, which it was required to accept. This was in complete accord with the Court's direction in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). "[I]n entertaining a motion for judgment as a matter of law, the court should review all the evidence in the record." 530 U.S. at 150. "In doing so... the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* The instant case is a classic example of what the Court in *Reeves* characterized as a "semantic" distinction between articulations of the Rule 50 standard. 530 U.S. at 150. Like the lower courts that had misstated the Court's articulation of the standard in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), Petitioners have confused the Eleventh Circuit's statement of "the evidence to which the trial court should *give credence*" with that which "the court should *review*." *Reeves*, 530 U.S. at 150 (emphasis in original). The Eleventh Circuit engaged in an appropriate *Reeves* analysis, and review of its decision is thus not called for.

Further, contrary to Petitioner's assertion, REN did not offer "undisputed contradictory evidence." Pet. at 7. As the foregoing statement of facts demonstrates, the evidence was highly disputed on nearly every issue, ranging from Respondent's satisfactory performance of his job (a matter that the District Court found amply demonstrated based in part on admissions by REN's employees, and did not in fact rely upon in granting judgment to REN) to the pretextual nature of his termination. On this latter point, testimony

was adduced regarding the event that allegedly directly led to his termination, the Claudette Cannatella "crucifix conversation" (cited in the terminationnotice) not just from Respondent, but from his ex-wife, Virginia Savino, who reported a completely benign, inoffensive and polite conversation that could not have been construed as harassing. *See* Statement of Facts, *supra*, at 7. Petitioner's evidence was thus far from "uncontradicted," or "unimpeached," as *Reeves* requires. Pet. at 8, citing *Reeves*, 530 U.S. at 150-51. *See also Reeves*, 530 U.S. at 151 ("unimpeached"). Nor could it be regarded as coming from "disinterested witnesses," as Petitioner claims, *id.*, citing *Reeves*, *ibid.* All of REN's witnesses were REN employees, and many of them held supervisory or management positions. A lay witness who is still employed by the defendant employer cannot be considered "disinterested," at least to the extent their testimony must be given particular credence.

For these reasons, the cases cited by Petitioner in support ot its contention that a conflict exists among the Circuits are inapposite. Each of the cases addresses the quantum of evidence proferred by the plaintiff to meet the burden shifting standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In each of the cases, the plaintiff established or was assumed to have established a prima facie case, but in order to establish pretext, offered only the bare, uncorroborated testimony of the plaintiff. As discussed above, that is not the case here, as Respondent has offered the testimony of other witnesses in addition to his own, and the testimony of Petitioner's witnesses is hardly uncontroverted.[3]

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[3] In *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000), a racial discrimination wrongful discharge case, Hawkins alleged that her negative reviews were wrong, and that she actually did her job well. 203 F.3d at 279. The court invoked the well-recognized rule that the correctness of the reason offered for discharge is irrelevant. *Id. Jackson v. E.J. Brach Corp.*, 176 F.3d 971 (7th Cir. 1999), *Stevens v. St. Louis University Medical Center*, 97 F.3d 268 (8th

II. CERTIORARI IS NOT WARRANTED BECAUSE NO REAL CONFLICT EXISTS BETWEEN THE CIRCUITS WITH RESPECT TO A PLAINTIFF'S BURDEN IN AN INDIRECT PROOF CASE, AND RESPONDENT'S CASE IS ONE OF DIRECT PROOF

Because this is not a case in which there was "abundant and uncontroverted evidence that no discrimination had occurred," *see* Pet. at 11, quoting *Reeves*, 530 U.S. at 148, for the reasons discussed above, this is not the "appropriate case" to define the circumstances in which a plaintiff is required to submit evidence in

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Cir. 1996), and *Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449 (7th Cir. 1991), also relied on this precept. Petitioner cannot rely on this rule, however, since if REN was wrong in its assessment that Respondent could be terminated for his discussions of religion, its actions were construable by the trier of fact as discriminatory. *See* 42 U.S.C. § 2000e(j): "The term "religion" includes all aspects of religious observance and practice..." Petitioner is then in the same position as an employer who asserts a "good faith" belief that Hispanic employees are poorly motivated, or that female employees will inevitably resign to have children. This kind of incorrect "reason" cannot stand muster as a matter of law.

Nichols v. Lewis Grocer, 138 F.3d 563 (1998), involved a sex discrimination non-promotion case in which "the only evidence linking [plaintiff's pass-over] to gender-based bias was [plaintiff's] self-serving testimony," and abundant objective evidence existed of the other candidate's superior qualifications. 138 F.3d at 570. *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556 (5th Cir. 1983), is to the same effect insofar as the court had only "generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination...." *Id.* at 564. Also to the same effect is *Babbar v. Ebadi*, 216 F.3d 1086 (10th Cir. 2000), in which the plaintiff sought to establish anti-Hindu animus in his pass-over for tenure by his bare allegations of discrimination alone.

addition to a prima facie case and proof of pretext. Pet. at 13, quoting *Reeves,* 530 U.S. at 154-55 (Ginsburg, J., concurring).

Further, the cases cited by Petitioner do not reveal any conflict among the Circuits with respect to the application of the *Reeves* standard for judgment as a matter of law. None of the three cases cited by Petitioner for the "conflict" actually reviewed a grant of judgment as a matter of law after trial. While the standard under Rule 50 is the same as that under Rule 56, *see Reeves*, 530 U.S. at 150, a trial affords the parties and the court a much fuller opportunity to develop the evidence for review. Accordingly, it would not be appropriate to grant certiorari to resolve any apparent differences of opinion ("semantic" or otherwise) on the *Reeves* standard for Rule 50 motions in the context of Circuit cases reviewing summary judgment before trial.

Perhaps more importantly, Respondent's case was not merely a case of indirect or circumstantial evidence. Respondent relied upon the Petitioner's direct evidence of the termination notice, which stated that the reason for his termination was "RELIGION." *See* Appellant's Initial Brief in Appeal No. 99-14355 (U.S.C.A. 11), at 30, 32-34. It is hard to conceive of more direct evidence than this, an affirmative admission by the employer in the termination notice itself. The *McDonnell Douglas/Burdine* test applies where the plaintiff seeks to prove his case through circumstantial, not direct evidence. Arguably, then, the Eleventh Circuit was not even required to apply that standard in reviewing the District Court's grant of judgment as a matter of law; Respondent was entitled to have a jury determine if he would have been fired "but for" the discriminatory reason.

CONCLUSION

The issues for the jury were simple: did Respondent harass his co-workers, and if not, was Respondent terminated as a result of the practice of his religion? The facts were highly disputed on almost every point at issue. "[T]he more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." Wright & Miller, FEDERAL

PRACTICE & PROCEDURE, § 2806, at p. 67.

The facts were undisputed that Respondent was not fired because of job performance, and that was expressly *not* one of the grounds upon which the District Court set aside the jury's verdict. The termination notice clearly indicated that the sole basis for his termination was the Claudette Cannatella conversation. Respondent presented evidence from which the jury could conclude that REN manufactured the offending Claudette Canatella conversation, turning it falsely into the "one last straw" of religious harassment, and that the jury could conclude that the real reason Respondent was fired was not because he was harassing co-workers but because of the practice of his religion. "If the only reason an employer offers for [its challenged action] is a lie, the inference that the real reason was a forbidden one may rationally be drawn and there must be a trial." *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996). Accordingly, the Eleventh Circuit properly reversed the District Court's order granting Petitioner judgment as a matter of law, and certiorari is not warranted in this case.

For the reasons set forth above, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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